

FILED

FEB 15 1978

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-891

FRANK S. BEAL, Secretary of Welfare
of the Commonwealth of Pennsylvania,

ROBERT P. KANE, Attorney General
of the Commonwealth of Pennsylvania,

THE COMMONWEALTH OF PENNSYLVANIA,
and F. EMMETT FITZPATRICK,

Appellants

vs.

JOHN FRANKLIN, M.D., and
OBSTETRICAL SOCIETY OF PHILADELPHIA,
Appellees

On Appeal
From the United States District Court
For the Eastern District of Pennsylvania

APPELLEES
MOTION TO DISMISS OR AFFIRM

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APPELLEES
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I

COUNTER-STATEMENT
OF QUESTION PRESENTED

Whether the lower court erred in declaring unconstitutional the mandate of Section 5(a) of the Pennsylvania Abortion Control Act, P.L. 209 of 1974, 35 Pa. Purdon's Statutes (P.S. 6605(a) [text set forth at pp. 7-8 of Appellants' Jurisdictional Statement], enforced by Section 5(d) of the Act, 35 P.S. 6605(d).

II

MOTION

Appellees respectfully move that the Supreme Court of the United States summarily affirm the holding of the three-

judge District Court, respectfully suggesting that:

- a) The appeal does not present a substantial federal question; and,
- b) Under the United States Constitution and existing precedent, the decision of the three-judge District Court was appropriate and indeed required.

In support of this Motion, it is respectfully submitted that Section 5(a) of the Pennsylvania Abortion Control Act unconstitutionally attempts to carve out a period of time during which a fetus "may be viable" and imposes requirements relating to the decision to abort during this period which are flatly inconsistent with the Constitution and holding of the Supreme Court of the United States in Roe v. Wade, 410 U.S. 113 (1973).

In invalidating Section 5(a) of the Act, the three-judge District Court properly reasoned that it tends to carve out a period of "potential viability" which, according to defendants' own witness, would occur at 20 to 26 weeks, in which the State seeks to regulate abortion in the interest of the fetus. The Section is in conflict with the Court's decision in Roe v. Wade, supra, which provides that before viability (which occurs at 24 to 27 weeks' gestation) the State may only regulate abortion in the interest of maternal health. The subsequent three-judge Court in the Middle District of Pennsylvania, Doe v. Zimmerman, 405 F.Supp. 534 (1975), also concluded that Section 5(a) of the Act was unconstitutional.

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Since the purpose of an abortion is invariably to obviate rather than facilitate a live birth, the effect of Section 5(a) would be to put a physician in jeopardy of criminal sanctions^{1/} where an abortion is performed between the 20th and 26th week of gestation. It would necessarily and by definition impose a chilling effect upon the constitutionally protected right of the woman, in consultation with her physician, to terminate a pregnancy during the latter portion of the second trimester.

For example and pertinently, the record in this case demonstrated that limiting abortion before the end of the second trimester of pregnancy would tend

1/ Section 5(d) provides for the enforcement of 5(a) through criminal sanctions.

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to undermine the opportunity of families with certain genetic characteristics to conceive and bear their own biological children and in some cases would lead to the abortion of normal and wanted children.

Dr. Hope Punnett, an expert on genetic testing and counseling, whose testimony was unrefuted in relevant part, testified that where couples have been identified as carriers of certain genetic disorders, a test can be performed during pregnancy to determine whether the fetus is affected with the genetic abnormality. For many of these conditions, the test requires culturing cells taken from the amniotic fluid. The test cannot be initiated until 16 weeks' gestation, and if the culture is successful, it takes two

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to six weeks to get results (R. 93) ^{2/}. If the cells in the initial culture do not grow, a second tap may be required, which would involve a further delay of one to ten days (R. 94). Consequently, positive results cannot be obtained until 18 to 20 weeks' gestation, and often later (R. 96).

Genetic abnormalities which can be diagnosed only through this method include Down's Syndrome (Mongolism) and Tay-Sachs. Tay-Sachs is a condition in which children are born apparently normal infants, and begin deteriorating when they are six months old. By age three, they have lost all function and require custodial care until they die at age 7 or 8 (R. 89-90).

2/ All references to the Record in the present Motion are to the testimony of Dr. Hope Punnett in the transcript of January 14, 1974 (sic. 1975).

Unlike most genetic conditions, where affected families are identified only after one child is born with the disease, Tay-Sachs carriers may be identified by a simple blood test (R. 91). Approximately one in every 15 Jews of Eastern European origin are carriers of this disorder, and there is a screening program in Philadelphia which seeks to test all members of this population for the trait (R. 98). Where both members of a couple are Tay-Sachs carriers, there is a 25% chance that a pregnancy will involve Tay-Sachs (R. 91). Where a couple are both identified as carriers of Tay-Sachs, the options presented through counseling are: 1) proceeding with conception in spite of the risk, 2) preventing conception entirely, 3) artificial insemination with a donor who is not a carrier, and 4) conception with prenatal

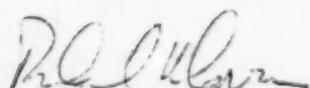
diagnosis and the possibility of aborting an affected fetus — the only option which would enable them to have their own biological children without risk (R. 91-92).

When asked what would happen if there were a cutoff of 20 weeks' gestation for abortion, Dr. Punnett demonstrated that it would severely undermine a genetic counseling program, because it is not possible to be assured of a final result from prenatal diagnosis within that period, and "one cannot do genetic counseling if you cannot follow it to a logical conclusion (R. 96). Where the test was not conclusive before 20 weeks, the family would be deprived of the benefits of the test results which could be obtained and forced to a choice of carrying through the pregnancy in spite of the risk, or aborting what may turn out to have been a normal and wanted child (R. 96).

CONCLUSION

For these reasons, both legal precedent and policy require that the decision of the District Court invalidating Section 5(a) of the Pennsylvania Abortion Control Act be affirmed or that this appeal be dismissed.

Respectfully submitted,



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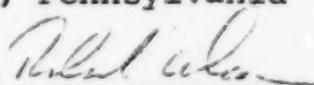
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CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellees, and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to the Supreme Court Rule No. 33, I have caused to be served true and correct copies of the foregoing Motion to Dismiss or Affirm upon each party required to be so served, by depositing said copy in the United States Postal Service mail box, with first-class postage prepaid and affixed, addressed as follows:

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